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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

PATRICK GENE POLAND, *Petitioner*,  
v.  
STATE OF ARIZONA, *Respondent*.

MICHAEL KENT POLAND, *Petitioner*,  
v.  
STATE OF ARIZONA, *Respondent*.

**On Writs For Certiorari to  
The Arizona Supreme Court**

**RESPONDENT'S BRIEF ON THE MERITS**

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## QUESTION PRESENTED

When the trial court found as one aggravating factor that the murders were heinous and sentenced petitioners to death, and at the same time found that a second aggravating factor of "pecuniary gain" would exist if the Arizona Supreme Court found that the term applied to murder-robberies, and when, on appeal, the Arizona Supreme Court reversed petitioners' convictions and found that the murders had not yet been proven heinous but that the "pecuniary gain" factor does apply to murder-robberies, did the double jeopardy clause preclude resentencing petitioners to death?

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## OPINIONS BELOW

The Arizona Supreme Court opinions holding that the double jeopardy clause did not preclude petitioners' death sentences are reported at 144 Ariz. 388, 698 P.2d 183 (1985) [Petitioner Patrick Gene Poland], and at 144 Ariz. 412, 698 P.2d 207 (1985) [Petitioner Michael Kent Poland].

The Arizona Supreme Court opinion reversing petitioners' convictions and remanding the matter for a new trial is reported at 132 Ariz. 269, 645 P.2d 784 (1982).

## CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

(N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

## STATEMENT OF THE CASE

On April 26, 1979, the grand jury of Yavapai County, Arizona, returned an indictment charging petitioners with two counts of first-degree murder in the killings of Russell Dempsey and Cecil Newkirk. The case proceeded to trial before a jury, and on November 24, 1979, that jury found both men guilty of the charges.

Pursuant to former Ariz.Rev.Stat.Ann. § 13-454(A), the trial court scheduled a sentencing hearing for February 29, 1980. At that hearing, the prosecution, relying upon the evidence presented at trial, argued that two statutory aggravating circumstances were present: (1) that petitioners had committed the murders as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary



value;<sup>1</sup> and (2) that petitioners had committed the murders in an especially heinous, cruel, or depraved manner.<sup>2</sup> The prosecution also submitted a memorandum urging the trial court to find the same two aggravating circumstances. (Joint Appendix, at 8-10.)

The trial court scheduled sentencing for April 9, 1980. Pursuant to former Ariz.Rev.Stat. Ann. § 13-454(C), the trial court returned a special verdict setting forth its findings on the existence or non-existence of the aggravating and mitigating circumstances. In that verdict, the court found that the aggravating factors set out in former Ariz.Rev.Stat. Ann. § 13-454(E)(1) and (2) were not present. (Joint Appendix, at 15.) With respect to the "pecuniary gain" aggravating circumstance, the trial court made the following finding:

3. The court finds the aggravating circumstance in § 13-454 E(3) [sic] is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of \$281,000.00

This, then, would be an aggravating circumstance.

(Joint Appendix, at 15-16.) The court also found that the "especially heinous, cruel, or depraved" aggravating factor was present. (Joint Appendix, at 16.) Finding no mitigating circumstances sufficiently substantial to call for leniency, the court sentenced petitioners to death. (Joint Appendix, at 14.)

Pursuant to Rules 26.15 and 31.2(b), Arizona Rules of Criminal Procedure, the clerk of the trial court filed notices of appeal on petitioners' behalf. The state did not cross-appeal. Petitioners filed a joint appellate brief with the Arizona Supreme Court. In that brief petitioners argued, among

<sup>1</sup> Former Ariz.Rev.Stat. Ann. § 13-454(E)(5).

<sup>2</sup> Former Ariz.Rev.Stat. Ann. § 13-454(E)(6).

other things, that there was insufficient evidence to support the trial court's finding of the "especially heinous, cruel or depraved" aggravating circumstance, and that their death sentences were therefore improper. (Joint Appendix, at 23-28.) In its answering brief respondent argued that the evidence did support the challenged circumstance. Respondent also asked the Arizona Supreme Court to clarify the trial court's conditional ruling on the "pecuniary gain" aggravating circumstance and find that circumstance to also be present. (Joint Appendix, at 18-21.)

On April 13, 1982, the Arizona Supreme Court filed its opinion. After rejecting a number of petitioners' claims of error, the court found that jurors had improperly considered evidence that had not been admitted at trial. This conduct, the court concluded, entitled petitioners to a new trial. *State v. Poland*, 132 Ariz. 269, 283-84, 645 P.2d 784, 798-99 (1982). The supreme court went on to discuss the trial court's findings concerning the imposition of the death penalty. With respect to the "especially heinous, cruel, or depraved" aggravating circumstance, the court made the following comments:

We do not believe that the evidence so far produced in this case shows that the murders were cruel. . . .

Neither does the evidence support a finding that the murders were heinous or depraved. . . .

. . . We do not believe it has been shown beyond a reasonable doubt that the murders were committed in an "especially heinous, cruel or depraved manner."

132 Ariz. at 285, 645 P.2d at 800. With respect to the "pecuniary gain" aggravating circumstance, the court made the following comments:

We do note, however, that the trial court mistook the law when it did not find that the defendants "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-454(E)(5). In so holding, the trial judge stated:

"5. The court finds the aggravating circumstance in § 13-454E(5) is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of \$281,000.00.

This, then, would be an aggravating circumstance."

It was not until after the trial in this case that we held, in *State v. Clark, supra*, that A.R.S. § 13-454(E)(5) was not limited to "murder for hire" situations, but may be found where any expectation of financial gain was a cause of the murder. Upon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance.

132 Ariz. at 285-86, 645 P.2d at 800-01. The court remanded the matter for a new trial.

Petitioners' retrial commenced on October 18, 1982. One month later, a jury again found both men guilty of the two first-degree murder charges.

The trial court set the required sentencing hearing for December 16, 1982. At that hearing (which continued on January 11, 1983), the prosecution, relying on the evidence presented at trial and presenting additional evidence, argued that the "pecuniary gain" and "especially heinous, cruel, or depraved" aggravating factors were present for both petitioners. It also argued that petitioner Patrick Poland had previously been convicted of a felony involving the use or threat of violence on another person.<sup>3</sup>

On February 3, 1983, the trial court returned its special verdict. In that verdict, the court found that the "pecuniary gain" and "especially heinous, cruel, or depraved" aggravating circumstances were present for both petitioners. It

<sup>3</sup>Former Ariz.Rev.Stat. Ann. § 13-454(E)(2). On October 5, 1981, petitioner Patrick Poland, in an unrelated case, was convicted of bank robbery and use of a dangerous weapon in a bank robbery.

found an additional aggravating circumstance for petitioner Patrick Poland: his prior felony convictions for crimes involving the use or threat of violence on another person. (Joint Appendix, at 78-80.) Finding no mitigating evidence sufficiently substantial to call for leniency, the trial court again sentenced petitioners to death. (Joint Appendix, at 3-4.)

On direct appeal to the Arizona Supreme Court, petitioners argued, among other things, that they had been "acquitted" of the death penalty on their first appeal. Therefore, they concluded, the double jeopardy clauses of the United States and Arizona Constitutions prohibited subsequent imposition of the death penalty.

The Arizona Supreme Court decided petitioners' appeals on March 20, 1985. *State v. Poland (Patrick)*, 144 Ariz. 388, 698 P.2d 183 (1985); *State v. Poland (Michael)*, 144 Ariz. 412, 698 P.2d 207 (1985). The supreme court unanimously affirmed petitioners' convictions.

The court, however, split over the sentencing double jeopardy issue. Justice Cameron, writing for a 3-member majority, concluded that the court had not "acquitted" petitioners of the death penalty in their first appeal:

Defendant contends that *Bullington* and *Rumsey* bar reimposition of the death penalty in the instant case. We do not agree. In those cases, the respective defendants were sentenced to terms of imprisonment. Upon remand, each was sentenced to death. The United States Supreme Court held that the Double Jeopardy Clause barred imposition of the death penalty in those cases. These holdings were based upon the fact that the respective state sentencing procedures resembled trials. Accordingly, because each defendant was initially sentenced to a term of imprisonment, he was impliedly "acquitted" of the death penalty.

In the instant case, defendant was sentenced to death at the end of his first trial. There was no implied "acquittal" of the death penalty. *Bullington* and *Rumsey* do not, therefore, apply. See *Knapp v. Cardwell*, 667



F.2d 1253, 1264-65 (9th Cir.), *cert. denied*, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

Defendant argues, however, that he was impliedly "acquitted" of the death penalty at the appellate level because *Poland I*, *supra*, overturned the single aggravating circumstance upon which his previous death sentence was based, that is that the murders were committed in an especially heinous, cruel or depraved manner, A.R.S. § 13-703(F)(6). Our holding in *Poland I*, however, was simply that the death penalty could not be based solely upon this aggravating circumstance because there was insufficient evidence to support it. This holding was not tantamount to a death penalty "acquittal."

*State v. Poland (Patrick)*, *supra*, 144 Ariz. at 404, 698 P.2d at 199; *accord*, *State v. Poland (Michael)*, *supra*, 144 Ariz. at 414, 698 P.2d at 209. The majority went on to find that the evidence still did not support the "especially heinous, cruel or depraved" aggravating circumstance, but did support the "pecuniary gain" and "prior conviction involving violence" aggravating circumstances. The majority concluded that petitioners' death sentences were appropriate. *State v. Poland (Patrick)*, *supra*, 144 Ariz. at 404-07, 698 P.2d at 199-202; *State v. Poland (Michael)*, *supra*, 144 Ariz. at 415-16, 698 P.2d at 210-11.

Justice Gordon, writing in dissent, disagreed with the majority's resolution of the double jeopardy issue. He felt that the supreme court had indeed "acquitted" petitioners of the death penalty in the first appeal:

Our decision in *Poland I* was surely a reversal of defendant's death penalty "conviction" for insufficient evidence constituting a final acquittal of that charge. In *Poland I* the trial court found one aggravating circumstance upon which it based the death penalty: A.R.S. § 13-454(E)(6) (now § 13-703(F)(6)), that defendant committed the offense in an especially heinous, cruel, or depraved manner. Because of a mistake of law, however, the trial court failed to find the pecuniary gain aggravating circumstance, A.R.S. § 13-454(E)(5)

(now § 13-703(F)(5)). On appeal, this Court thoroughly analyzed the lone aggravating circumstance supporting defendant's death penalty, and we found it nonexistent because of insufficient evidence. As a matter of common sense, then, when this Court struck down the sole aggravating factor found by the trial court to justify defendant's death penalty because of insufficient evidence, we necessarily reversed defendant's death penalty "conviction" for lack of sufficient evidence.

*State v. Poland (Patrick)*, *supra*, 144 Ariz. at 409, 698 P.2d at 204, *accord*, *State v. Poland (Michael)*, *supra*, 144 Ariz. at 416, 698 P.2d at 211. Thus, Justice Gordon concluded that reimposition of petitioners' death sentences was constitutionally prohibited.

Petitioners filed motions contesting the supreme court's affirmance of their convictions and the majority's resolution of the double jeopardy issue. On May 7, 1985, the supreme court denied the motions, with Justices Gordon and Feldman voting to grant.

Petitioners next filed petitions for writ of certiorari pursuant to 28 U.S.C. § 1257(3). On October 7, 1985, this Court granted the petitions for writ of certiorari, limited to the double jeopardy question.

## SUMMARY OF ARGUMENT

The Arizona Supreme Court did not "acquit" petitioners of the death penalty on their first appeal. The court's comments regarding petitioners' sentences cannot be read as a finding that the state had failed to prove its case for the death penalty, particularly in light of the trial court's treatment of the "pecuniary gain" aggravating circumstance. At most, the Arizona Supreme Court "acquitted" petitioners of a single aggravating circumstance. Since the protection of the double jeopardy clause does not extend to individual aggravating circumstances, reimposition of the death penalty in this case is not prohibited by the constitution.

Further, this Court should reconsider its decisions that,

in capital cases, pronouncement of a sentence is an acquittal of any higher sentence. While certain sentencing procedures may resemble trial procedures, the purposes of trials and sentencings are different. Therefore, the protection of the double jeopardy clause should not be extended to the imposition of sentences.

### ARGUMENT

The issue in this case is a narrow one. Petitioners were found guilty of first-degree murder and the trial court imposed death sentences. In its special verdict that preceded the imposition of sentence, the trial court found the existence of one aggravating circumstance (that the murders were especially heinous, cruel or depraved) and due to an uncertainty over the legal meaning of a second aggravating circumstance, made a conditional finding of that circumstance (that the murders were committed for pecuniary gain). On appeal the petitioners contended, among other things, that the evidence did not support the trial court's finding of the "heinous, cruel or depraved" aggravating circumstance. The appellate court, after reversing petitioners' convictions due to jury misconduct, discussed the imposition of the death penalty. It stated that the evidence "so far produced" did not support the "heinous, cruel or depraved" circumstance. It went on to note the trial court's uncertainty over the legal meaning of the "pecuniary gain" circumstance, stated its legal meaning, quoted the court's factual findings, and stated that the trial court "may find" that circumstance should petitioners again be convicted of first-degree murder upon retrial. The issue here is whether the appellate court "acquitted" petitioners of the death penalty so that subsequent death sentences violate the Double Jeopardy Clause.

#### I. *The Arizona Supreme Court did not "acquit" petitioners of the death penalty for double jeopardy purposes.*

Until recently, this Court had never considered the imposition of a sentence to be an acquittal of any higher sentence. For example, this Court has upheld sentences after retrial

more severe than the original sentences. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919). It has also allowed the government to appeal what the government considers an inadequate sentence. *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). Thus, sentences have traditionally not had the finality of jury verdicts.

This Court has, however, recognized exceptions to that tradition. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and *Arizona v. Rumsey*, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), held that the double jeopardy clause prohibited imposition of death sentences once a defendant had been "acquitted" of the death penalty. The stated reason for this was that the capital sentencing procedures in Missouri and Arizona so resembled the procedures in a jury trial on the issue of guilt that the two could not be distinguished for double jeopardy purposes. The Missouri and Arizona sentencing procedures differed from those considered in this Court's previous decisions where the imposition of a particular sentence was not regarded as an acquittal.

Bullington was convicted of capital murder. At the statutorily mandated sentencing hearing, the prosecution presented evidence and argued that the presence of two statutory aggravating factors called for the death penalty. The jury's sentencing verdict, however, fixed Bullington's punishment not at death, but at imprisonment for life. The trial court granted Bullington's subsequent motion for a new trial. The prosecution then announced its intention to seek the death penalty after retrial. Both the trial court and the Missouri Supreme Court rejected Bullington's claim that the double jeopardy clause barred imposition of the death penalty after the first jury had declined to impose it. This Court then granted review. After concluding that Missouri's capital sentencing procedure resembled a trial on



the issue of guilt or innocence, this Court held that the jury's verdict imposing a life sentence constituted a determination that the prosecution had failed to "prove its case" that Bullington deserved the death penalty. Thus, the double jeopardy clause precluded imposition of the death penalty at Bullington's retrial.

Rumsey was convicted of first-degree murder. At the statutorily mandated sentencing hearing, the state relied upon the evidence presented at trial to argue that three statutory aggravating factors were present and that the death penalty was appropriate. In its special sentencing verdict, the trial court found that no aggravating factors were present. Since such a finding meant that the court was statutorily barred from sentencing Rumsey to death, it sentenced him to life imprisonment, the only remaining alternative. Rumsey appealed to the Arizona Supreme Court, arguing that a consecutive robbery sentence was illegal. The state cross-appealed, arguing that the trial court had made an error of law in interpreting the "pecuniary gain" aggravating factor to apply only to contract killings. The supreme court rejected Rumsey's claim but agreed with the state, and remanded to the trial court for resentencing on the murder charge. At that resentencing, the trial court found the "pecuniary gain" aggravating factor and no mitigating factors sufficient to call for leniency. It therefore sentenced Rumsey to death. On appeal the Arizona Supreme Court, relying upon this Court's decision in *Bullington*, concluded that Rumsey had been "acquitted" of death at his initial sentencing and that his subsequent death sentence violated the constitutional prohibition against double jeopardy. This Court granted the state's petition for writ of certiorari and affirmed the Arizona Supreme Court's decision. This Court stated that Arizona's capital sentencing procedure was indistinguishable from that of Missouri for purposes of the double jeopardy clause. Thus, it concluded that the trial court's original imposition of a life sentence, even though based on a misconstruction of the "pecuniary gain" factor, constituted an "acquittal on

the merits" of the death penalty "charge" and retrial on the same "charge" was barred.

*Bullington* and *Rumsey* do not mandate relief in petitioners' cases. To begin with, the trial court imposed the death penalty at petitioners' first sentencing. In its special verdict supporting those death sentences, the trial court found the existence of the "heinous, cruel or depraved" aggravating circumstance. It also made the following finding regarding the "pecuniary gain" aggravating circumstance:

3. The court finds the aggravating circumstance in § 13-454 E(3) [sic] is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of \$281,000.00.

This, then, would be an aggravating circumstance.

(Joint Appendix, at 15-16.) The trial court in *Rumsey* specifically found the "pecuniary gain" factor did not exist. It also made no factual findings regarding the factor. Furthermore, on appeal, the Arizona Supreme Court reversed petitioners' convictions. In its subsequent discussion of the death penalty, the court stated that the evidence "so far produced" did not establish the "heinous, cruel or depraved" circumstance. It also took note of the trial court's finding regarding the "pecuniary gain" factor, dispelled the trial court's uncertainty over the legal meaning of the factor, and stated that the trial court could find the existence of the factor in the event of petitioners' convictions following retrial. The Arizona Supreme Court did not state that the evidence was insufficient to support petitioners' death sentences. It did not state that the state had failed to prove its case on the death penalty "charge." It did not "acquit" petitioners of the death penalty.

Petitioners argue that on the first appeal the Arizona Supreme Court found the evidence insufficient to support

the sole aggravating circumstance found by the trial court. Without that circumstance, they assert, there was nothing to support the death sentences. Relying upon *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), and *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), petitioners conclude that the Arizona Supreme Court necessarily "acquitted" them of the death penalty.

These cases do not support petitioners' position. In *Hudson*, the trial court granted a new trial because the state had failed to prove Hudson's guilt of first-degree murder as a matter of law; the state supreme court agreed that this was what the trial court had done. The finding by the Arizona Supreme Court that the evidence "so far produced" did not establish a single aggravating factor, coupled with its finding regarding the second aggravating factor, is a far cry from the much more explicit finding in *Hudson*.

In the *Burks* case, an appellate court found that the government failed to meet its burden of proving Burks' sanity beyond a reasonable doubt. The government must prove all elements of the crime charged. If it fails to prove any one of those elements, it has failed to prove guilt. In contrast, the state of Arizona does not need to prove every aggravating circumstance to prove the death penalty "charge." It need only prove one. Thus, a finding that the evidence is insufficient to support one aggravating factor is not necessarily a finding that the evidence is insufficient to support the death penalty.

As for *Greene*, the holding therein supports respondent's position more than it supports petitioners'. The Florida Supreme Court reversed Greene's conviction in a per curiam opinion joined by four justices. That opinion stated that "the evidence was definitely lacking in establishing beyond a reasonable doubt that [Greene] committed murder in the first degree . . . ." However, three of the four justices who had joined the per curiam opinion also filed a separate

"special concurrence." That concurrence made no mention of evidentiary insufficiency, but did discuss a trial error that required reversal. Greene was then retried and convicted of murder. Eventually, Greene brought to this Court his claim that the double jeopardy clause barred his retrial because of the appellate court's finding of evidentiary insufficiency. This Court noted that the inconsistencies between the per curiam opinion and the special concurrence made the basis for the state appellate court's reversal unclear, and therefore remanded the case to the federal court of appeals for reconsideration:

The Court of Appeals will be free to direct further proceedings in the District Court or to certify unresolved questions of state law to the Florida Supreme Court.

*Greene v. Massey, supra*, 437 U.S. at 27, 98 S.Ct. at 2155.<sup>4</sup>

In petitioners' cases, if there is uncertainty over whether the Arizona Supreme Court's finding of evidentiary insufficiency regarding the "heinous, cruel or depraved" aggravating circumstance was also a finding of evidentiary insufficiency regarding the death penalty, such uncertainty is best resolved by the Arizona Supreme Court. A majority of that court ended any uncertainty on petitioners' appeals following their retrials:

Our holding in *Poland I*, however, was simply that the death penalty could not be based solely upon this aggravating circumstance because there was insufficient evidence to support it. This holding was not tantamount to a death penalty "acquittal."

<sup>4</sup>The Court of Appeals did certify questions to the Florida Supreme Court in an effort to determine the basis for their reversal of Greene's conviction. After receiving the Florida court's answers, the federal court concluded that a retrial had been ordered on the bases of evidentiary weight and the "interests of justice" and not on the basis of insufficiency of the evidence. The federal court therefore denied Greene any relief on his double jeopardy claim. *Greene v. Massey*, 706 F.2d 548 (5th Cir. 1983), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S.Ct. 718, 79 L.Ed.2d 180, rehearing denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S.Ct. 1431, 79 L.Ed.2d 754 (1984).



*State v. Poland (Patrick)*, *supra*, 144 Ariz. at 404, 698 P.2d at 199, *accord*, *State v. Poland (Michael)*, *supra*, 144 Ariz. at 414, 698 P.2d at 209.

Petitioners attempt to deal with the Arizona Supreme Court's discussion of the "pecuniary gain" factor in *Poland I*. They argue that the state's failure to cross-appeal from the trial court's finding that the factor did not exist deprived the appellate court of jurisdiction regarding that factor. Petitioners' argument is flawed from the start. The trial court, unlike the trial court in *Rumsey*, did not find that the "pecuniary gain" factor did not exist. It was uncertain of the correct legal meaning of the factor and thus made findings of fact in accordance with the only apparent interpretations: that this was not a "contract killing," but that it was committed for pecuniary gain. It thus left the Arizona Supreme Court a factual basis upon which to apply the correct legal meaning of the factor. Since there was no finding that the factor simply did not exist (as was the case in *Rumsey*), there was no need for a cross-appeal. The Arizona Supreme Court has consistently stated its scope of review in death penalty cases:

Our obligation on review is to determine whether the punishment imposed is greater than the circumstances of the case warrant." *State v. Richmond*, 114 Ariz. at 196, 560 P.2d at 51. In capital cases "we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances . . . [to] determine for ourselves if the latter outweigh the former . . . ." *Id.* (citations omitted). Our proportionality review is not to determine whether life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate." *Id.* The purpose of our review is well stated in the Supreme Court's opinion regarding the Florida statute, which is similar to ours.

That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into

the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.

*Proffitt v. Florida*, 428 U.S. 242, 259-60, 96 S.Ct. 2960, 2970, 49 L.Ed.2d 913 (1976) (emphasis supplied).

*State v. Rumsey*, 136 Ariz. 166, 173, 665 P.2d 48, 55 (1983). In carrying out its review of death penalty cases, the Arizona Supreme Court has on another occasion found the existence of an aggravating circumstance not found by the trial court. *State v. Tison*, 129 Ariz. 526, 544, 633 P.2d 335, 353 (1981), *cert. denied*, 459 U.S. 882 (1982). Thus, the absence of a state cross-appeal did not preclude the Arizona Supreme Court in *Poland I* from treating the "pecuniary gain" factor.

Petitioners' ultimate position in this case appears to call for an extension of this Court's holdings in *Rumsey* and *Bullington* so that not only would Arizona's capital sentencing scheme be comparable to a trial for purposes of the double jeopardy clause, but also that sentencing "trial" would consist of a number of separate "trials" on the existence or nonexistence of each individual aggravating circumstance. Petitioners would have this Court hold that a trial court's failure to find the existence of an aggravating factor constitutes an "acquittal" of that factor. Thus, double jeopardy notions would preclude any finding of that circumstance at a subsequent resentencing.

This Court should not extend the protection of the double jeopardy clause this far. Double jeopardy protection only comes into play where there has been an end to a criminal proceeding, e.g., a jury verdict of not guilty, or a judge's or jury's decision to impose a life sentence rather than the death penalty in certain trial-like capital sentencing



proceedings. See *Justices of Boston Municipal Court v. Lydon*, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984). A number of lower courts considering this question have concluded that for purposes of double jeopardy protection, there is no such thing as an "acquittal" of an aggravating circumstance in a capital sentencing proceeding. See, e.g., *Green v. Zant*, 738 F.2d 1529 (11th Cir.), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984); *Hopkinson v. State*, 664 P.2d 43 (Wyo.), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983); *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, cert. denied, 461 U.S. 971, (1983); *Spaziano v. State*, 443 So.2d 508 (Fla. 1983);<sup>5</sup> *Zant v. Redd*, 249 Ga. 211, 290 S.E.2d 36 (1982), cert. denied, 463 U.S. 1213 (1983). However, there is also opposing lower court authority. See, e.g., *Young v. Kemp*, 760 F.2d 1097 (11th Cir. 1985); *Jones v. Thigpen*, 741 F.2d 805 (5th Cir. 1984); *Godfrey v. Francis*, 613 F.Supp. 747 (D.C.Ga. 1985). None of these last three decisions is yet final. Even if this Court were to follow them, petitioners herein have never been "acquitted" of the "pecuniary gain" factor, and thus have never been "acquitted" of the death penalty.

Petitioners' cases present an additional reason for not applying double jeopardy protection to individual aggravating factors. At the time of his first sentencing, petitioner Patrick Poland did not have a prior conviction involving the use of violence. The trial court consequently found that the aggravating circumstance of a prior felony conviction involving violence did not exist. However, by the time of his second sentencing, petitioner did have such a conviction and the trial court consequently found that aggravating factor. Circumstances essential to a sentencing decision, unlike the elements of a crime, can change over time. The double jeopardy clause should not preclude consideration of

<sup>5</sup> This Court affirmed Spaziano's conviction and sentence in *Spaziano v. Florida*, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), although it did not consider the "double jeopardy - aggravating circumstance" issue.

changed circumstances in a sentencing decision.

## II. Pronouncement of a sentence is not an acquittal of any higher sentence.

As a separate and independent ground for denying petitioners relief, respondent submits that this Court should overrule its decisions in *Bullington* and *Rumsey*. This court has attempted to limit the effect of those decisions to capital cases. See *Pennsylvania v. Goldhammer*, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S.Ct. 353, \_\_\_\_\_ L.Ed.2d \_\_\_\_\_ (1985). Given a sentencing procedure sufficiently similar to a trial, however, there is no reason why courts will not attempt to extend those decisions to non-capital cases. Arizona's non-capital sentencing scheme, for example, bears a number of similarities to its capital sentencing scheme. Compare Ariz.Rev.Stat. Ann. §§ 13-702 and 13-703. Extending double jeopardy protection to non-capital sentences will have a detrimental effect on the criminal justice system. It will prevent consideration of changed circumstances between sentencing and resentencing. It will protract sentencings by making lengthy hearings almost a necessity. It will allow consideration of only those things that can be proved beyond a reasonable doubt. Thus, prosecutors unable to meet that burden of proof will not present all of the information at their disposal, thereby depriving the sentencer of the means to judge a defendant's character.

Despite any similarities in procedures, trials and sentencings have fundamentally different purposes. The purpose of the former is to discover guilt or innocence of the crime charged. That crime has elements that must always be proved; those elements never change. The double jeopardy clause recognizes the importance of a finding of guilt. Retrials increase the possibility of an innocent man being found guilty, and the double jeopardy clause protects against that possibility. At sentencing, the key question of guilt or innocence has been laid to rest. There is no "innocent man" at sentencing and thus the protection of the double jeopardy clause is not needed.

The capital sentencing procedures *Bullington* and *Rumsey* found to be "like a trial" were enacted by the states in response to this Court's concerns that the death penalty was being imposed in an arbitrary and freakish manner. These procedures were designed to limit discretion and provide for more rational and even-handed imposition of death sentences. Yet by attaching double jeopardy protection to these procedures, this Court has "built in" an arbitrary and freakish element in capital sentencing. For example, two defendants before two different judges may arrive at sentencing with exactly the same circumstances present. If one defendant's sentencing judge knows the legal meaning of the "pecuniary gain" factor and the other does not, only one defendant will receive the death penalty when in fairness both should. Freakish results on the question of guilt are tolerable because of the concern that an innocent man may be convicted. But there is no similar concern at sentencing and thus no good reason to tolerate freakish results. By overruling *Bullington* and *Rumsey*, this Court can reduce the possibility of arbitrary and freakish results in death penalty cases.

### CONCLUSION

No court has ever "acquitted" petitioners of the death penalty. The trial court's factual findings at the initial sentencing did not rule out the existence of the "pecuniary gain" factor. Thus, when the Arizona Supreme Court found an evidentiary insufficiency with respect to the "heinous, cruel or depraved" factor, it did not "acquit" petitioners of the death

penalty. The judgment of the Arizona Supreme Court upholding petitioners' death sentences should be affirmed.

Respectfully submitted,

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